No. 20-3890

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANIEL LITTLEPAGE,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
TIM SHOOP, Warden,)
)
Respondent-Appellee.)

Before: McKEAGUE, Circuit Judge.

Daniel Littlepage, a pro se Ohio prisoner, appeals from the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Littlepage now has applied for a certificate of appealability ("COA"). Littlepage also moves for permission to proceed in forma pauperis ("IFP").

In 2013, Littlepage pleaded guilty to aggravated murder, and the trial court sentenced him to life in prison, with parole-eligibility after twenty years. The Ohio Court of Appeals granted Littlepage's motion for a delayed direct appeal, and the court subsequently affirmed his conviction and sentence. *State v. Littlepage*, No. C-140574 (Ohio Ct. App. Aug. 26, 2015). The Ohio Supreme Court denied further review.

In 2014, Littlepage filed a state post-conviction petition, which the trial court denied. The Ohio Court of Appeals affirmed this decision, *State v. Littlepage*, No. C-140760 (Ohio Ct. App. Dec. 4, 2015), and Littlepage did not timely appeal this decision to the Ohio Supreme Court. Littlepage also filed several other post-judgment motions, all of which were denied.

In 2015, Littlepage filed an application to reopen his direct appeal under Ohio Rule of Appellate Procedure 26(B) in order to raise ineffective-assistance-of-appellate-counsel claims.

The Ohio Court of Appeals denied the application, *State v. Littlepage*, No. C-140574 (Ohio Ct. App. Jan. 26, 2016), and the Ohio Supreme Court denied further review.

In 2017, Littlepage filed his § 2254 petition, alleging that: (1) he did not knowingly, intelligently, and voluntarily enter his guilty plea; (2) his appellate counsel rendered ineffective assistance; (3) state post-conviction procedures denied him due process; and (4) he is actually innocent. Over Littlepage's objections, the district court adopted the magistrate judge's reports and recommendations, *Littlepage v. Jenkins*, No. 1:16-CV-1005, 2018 WL 806241 (S.D. Ohio Feb. 9, 2018); *Littlepage v. Jenkins*, No. 1:16-CV-1005, 2017 WL 6508724 (S.D. Ohio Dec. 20, 2017), dismissed the petition, *Littlepage v. Warden, Chillicothe Corr. Inst.*, No. 1:16-CV-1005, 2020 WL 3957940 (S.D. Ohio July 13, 2020), and denied Littlepage a COA.

Under 28 U.S.C. § 2253(c)(2), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003)); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Initially, it is noted that, in his COA application, Littlepage maintains that the district court failed to address several claims he raised in his habeas petition, including allegations of judicial bias and an illegal sentence. However, a review of his § 2254 petition reveals that Littlepage did not clearly present these issues to the district court, and that the court addressed all of the claims that Littlepage enumerated in his habeas petition. Because Littlepage failed to raise these claims properly in the district court, this court will not consider them for the first time on appeal. *See Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014).

With respect to the claims properly raised in the district court, Littlepage first argues that his guilty plea was unknowing and involuntary. For Littlepage's plea to survive constitutional scrutiny, he must have entered the plea knowingly, voluntarily, and intelligently. *See Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); *Fautenberry v. Mitchell*, 515 F.3d 614, 636-37 (6th Cir. 2008). A defendant enters into a plea knowingly when he has "sufficient awareness of the relevant

circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). The State can satisfy its burden of showing that a defendant's plea was knowing and voluntary by producing a transcript of the defendant's plea proceeding. *McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004); *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). A plea-proceeding transcript suggesting that a plea was made voluntarily and intelligently creates a "heavy burden" for a petitioner seeking to overturn his plea. *Garcia*, 991 F.2d at 328. The defendant's guilty plea colloquy protects against claims that his plea was the result of inadequate advice because the record can establish that he understood the advantages and disadvantages of the plea and the sentencing consequences. *Missouri v. Frye*, 566 U.S. 134, 142 (2012).

Littlepage has not made a substantial showing that his guilty plea was invalid. At the plea hearing, the prosecutor set forth the facts underlying Littlepage's conviction, including Littlepage's repeated confessions to murdering his brother. Littlepage averred that he was making the plea of his own free will and that no threats or promises had been made in order to obtain his plea. The court informed him of the nature of the charge against him and the possible sentences that he faced. The court also described the rights that Littlepage was waiving by pleading guilty. Additionally, Littlepage averred that he was not under the influence of drugs or alcohol at the time of his plea.

While Littlepage now maintains that his attorney improperly pressured him to plead guilty, he expressly stated at the plea hearing that his guilty plea did not result from any threats or promises, thereby negating his subsequent claim that he pleaded guilty due to his attorney's alleged pressure. *See Ramos v. Rogers*, 170 F.3d 560, 565 (6th Cir. 1999). Littlepage also argues that he did not voluntarily confess to the murder; however, once a criminal defendant has pleaded guilty in open court, he may not raise independent claims relating to the deprivation of constitutional rights that occurred prior to his plea's entry. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Werth v. Bell*, 692 F.3d 486, 495 (6th Cir. 2012). To the extent that Littlepage contends he received ineffective assistance of counsel for failing to investigate his case properly, this same rule extends to pre-plea claims alleging counsel's ineffectiveness, unless they concern the voluntary or knowing

nature of the defendant's plea. *See United States v. Stiger*, 20 F. App'x 307, 308-09 (6th Cir. 2001) (order).

Littlepage next argues that various parts of the state court process failed to comply with state law, but such a claim is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Thomas v. Stephenson*, 898 F.3d 693, 700 (6th Cir. 2018). To the extent that Littlepage challenges his post-plea state court proceedings, those claims also do not provide a basis for federal habeas relief. *See Alley v. Bell*, 307 F.3d 380, 387 (6th Cir. 2002); *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986).

Nor has Littlepage made a substantial showing that his appellate counsel rendered ineffective assistance. While he argues that his appellate counsel was ineffective for failing to raise numerous issues, his guilty plea waived these various challenges, and appellate counsel is not ineffective for failing to raise meritless arguments. *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

Lastly, while Littlepage asserts that he did not murder the victim, any freestanding claim of actual innocence in a non-capital case does not provide a basis for federal habeas relief. *See Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010).

Accordingly, Littlepage's COA application is **DENIED**. His IFP motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-3890

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 02, 2021
DEBORAH S. HUNT, Clerk

DANIEL LITTLEPAGE,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
TIM SHOOP, Warden,)
)
Respondent-Appellee.)

Before: KETHLEDGE, DONALD, and LARSEN, Circuit Judges.

Daniel Littlepage, a *pro se* Ohio prisoner, petitions for rehearing of this Court's November 19, 2020, order denying his motion for a Certificate of Appealability. We have reviewed the petition and conclude that this Court did not overlook or misapprehend any point of law or fact in denying Littlepage's motion for a Certificate of Appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT CINCINNATI

DANIEL LITTLEPAGE,

Petitioner, : Case No. 1:16-cv-1005

- vs - District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

CHARLOTTE JENKINS, Warden,
Chillicothe Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This is a habeas corpus case, brought pro se by Petitioner Daniel Littlepage under 28 U.S.C. § 2254. The Petition was filed January 26, 2017 (ECF No. 9). The same day Magistrate Judge Stephanie Bowman ordered the State to file an answer (ECF No. 8). In response the Warden filed the State Court Record ("SCR")(ECF No. 13) and a Return of Writ (ECF No. 14). On July 20, 2017, Petitioner filed his Reply (ECF No. 15).

Petitioner also filed a Motion for a Complete Record to include all papers from his post-judgment mandamus action to compel discovery and to add Exhibits 16, 28, and 29 (ECF No. 16). The Magistrate Judge granted that Motion to the extent of ordering that state court decisions in the mandamus action be produced. Having examined those decisions and considered Petitioner's argument for including the entire file (ECF No. 23), the Magistrate Judge concludes no further filings from the mandamus action are needed to adjudicate this habeas corpus case.

The appellate decisions filed by Respondent show that Mr. Littlepage never obtained any

relief in his mandamus action. This is because, as the Ohio Supreme Court held, discovery is a pre-trial right only. *State ex rel Littlepage v. Deters*, 148 Ohio St. 3d 507, ¶ 6 (2016). *Brady v. Maryland*, 373 U.S. 83 (1963) does not apply post-conviction. *District Attorney for Third Judicial District v. Osborne*, 557 U.S. 52, 68-69 (2009). There is no *Brady* violation by failure to disclose impeachment information before guilty plea. *United States v. Ruiz,* 536 U.S. 622, 633 (2002).

Mr. Littlepage emphasizes that his attorney made a timely demand for discovery and motion for *Brady* material; copies with Littlepage's handwritten notes are attached to ECF No. 23. Ordinarily discovery in a criminal case would be made to defense counsel, not to the defendant himself, but Littlepage offers no proof from his attorney that he (Burke) did not received discovery. On the other hand, if Littlepage believed he needed discovery before pleading guilty, it was incumbent on him to say so. If there was a *Brady* violation prior to the plea, it, along with other pre-plea constitutional violations, was waived in the plea process.

Littlepage also insists that Judge Nadel's handwritten entry denying a motion for delayed appeal (ECF No. 23-1, PageID 1204) is somehow a fraud on the Court does not state a claim for habeas relief. There is no fraud at all evident in that entry. The Court declines to expand the record further by ordering the addition of more material from the mandamus proceeding.

Procedural History

On July 26, 2013, the Hamilton County grand jury indicted Petitioner Littlepage on one count of murder and one count of aggravated murder, both with firearm specifications, arising out of the July 18, 2013, death of Petitioner's brother Larry Littlepage.

After some pretrial litigation, Littlepage entered into a plea agreement whereby he would plead to the aggravated murder charge and one firearm specification with the remaining count and specification dismissed. The trial judge sentenced Petitioner to life imprisonment with parole eligibility at twenty years plus three consecutive years for the firearm specification.

Littlepage was sentenced in mid-January 2014, and took no direct appeal within the thirty days allowed for that process. However, in October 2014 the First District Court of Appeals granted his motion for delayed direct appeal and appointed counsel. Counsel briefed one assignment of error claiming the guilty plea was not knowing, intelligent, and voluntary. The First District, however, affirmed the conviction. *State v. Littlepage,* No. C-140574 (1st Dist. Aug. 26, 2015)(unreported; copy at ECF No. 13, PageID 550 *et seq.*), Littlepage appealed to the Ohio Supreme Court, but that court declined to exercise appellate jurisdiction. *State v. Littlepage*, 144 Ohio St. 3d 1429 (2015), *cert. denied sub. nom. Littlepage v. Ohio*, Case No. 15-8649, 136 S.Ct. 22383, 195 L.Ed.2d 270 (2016)(copy at ECF No. 13, PageID 609).

In August 2014, Littlepage filed a petition for post-conviction relief under Ohio Revised Code § 2953.21, which the trial court denied (SCR, ECF No. 13, PageID 457). That denial was affirmed on appeal. *State v. Littlepage,* No. C-140760 (1st Dist., Dec. 4, 2015)(unreported; copy at SCR, ECF No. 13-1, PageID 879-81.) Petitioner did not timely appeal and the First District denied a motion to re-file the dismissal to allow an appeal (SCR, ECF No. 13-1, PageID 882-96, PageID 897).

Littlepage filed an appeal from denial of his petition for post-conviction relief in December 2014. The First District considered the appeal on the merits, but affirmed dismissal of the petition. *State v. Littlepage*, No. 140760 (1st Dist. Dec. 4, 2015)(unreported; copy at ECF

No. 13, PageID 879 et seq.) Littlepage has also filed post-judgment motions for new trial and to withdraw guilty plea, for DNA testing, to correct his sentence, and for release of grand jury testimony, none of which have been successful.

In November 2015, Littlepage filed an application to reopen the direct appeal under Ohio R. App. P. 26(B) to raise claims of ineffective assistance of appellate counsel. The First District denied the application. *State v. Littlepage,* No. C-140574 (unreported; copy at ECF No. 13, PageID 648, et seq.). The Ohio Supreme Court declined jurisdiction over a subsequent appeal. *State v. Littlepage,* 145 Ohio St. 3d 1461 (2016).

Mr. Littlepage then filed his Petition for Writ of Habeas Corpus in this Court, pleading three grounds for relief:

> **GROUND 1:** The Ohio State lower courts erred and abused their discretion by affirming the Judgment of the Trial Court; without a De Novo review, when the Record supports that Petitioner's guilty plea was not made knowingly, intelligently or voluntarily and, in fact, was logically inconsistent with the facts and not supported by the evidence; as Petitioner is innocent.
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> . . .
>
> **GROUND 2:** It is error and an abuse of discretion for the Ohio State Courts; especially the Court of Appeals, to ignore the clear evidence of ineffective assistance of Appellate Counsel on a Direct Appeal; after granting Petitioner's Motion to remove the same Appellate Counsel; who filed an Ander's [sic] Brief in support of Post-conviction Relief as well as error and abuse of discretion to Deny his Application to Reopen Direct Appeal under App. R. 26(B); when the Petitioner established a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel. See State v. Murnahan, 63 Ohio St. 3d 60 (1992). Further, the evidence presented did support that Petitioner was denied effective assistance; in that appellate counsel performed deficiently, by failing to raise arguments and assignments of error that had a reasonable probability of success had counsel presented those claims on appeal. See State v. Bradley, 42 Ohio St.3d 136 (1989).

. . .

> **GROUND 3**: In light of the procedural errors and omissions, the Petitioner was denied due process and fair proceedings; but due to the ineffective assistance of both trial and appellate counsel, his claims were not argued or presented; leaving his only option, A Petition for State Writ of Habeas Corpus pursuant to O.R.C. Section 2725.03, to assert that he is being unlawfully restrained of his liberty by the State of Ohio. See In Re Lockhart, 157 Ohio St.192 (1952); which held that a State Habeas Action was the appropriate vehicle to secure relief from an illegal and void sentence. Here, the constitutional violations, deprivations of substantial rights, and cumulative errors present in his state court proceedings rise to the level of Plain or Reversible Error. See Crim.R. 52(B). These errors must now be reviewed by this Federal District Court to prevent a fundamental miscarriage of justice. *Engle v. Isaac*, 456 U.S. 107 (1982)

(Petition, ECF No. 9, PageID 192, 198, 203.)

Analysis

Ground One: Invalid Guilty Plea

Mr. Littlepage asserts his guilty plea was not knowing, intelligent, and voluntary and that his conviction is supported by insufficient facts in that he is actually innocent.

Warden Jenkins defends this Ground for Relief on the merits and does not raise any procedural defense (Return of Writ, ECF No. 14, PageID 1119-26).

Mr. Littlepage's Reply is not organized around his three Grounds for Relief but intersperses arguments about his plea with accusations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, fraud on the court by the trial judge, failure to

produce evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), etc. Most confusing is a lack of clear chronology which would enable this Court to discern what Mr. Littlepage claims happened and when. This Report will attempt to organize the material in the Petition and Traverse around the claims actually made.

Mr. Littlepage's First Ground for Relief asserts that his plea of guilty was not knowing, intelligent, and voluntary. A plea of guilty or no contest is valid if, but only if, it is entered voluntarily and intelligently, as determined by the totality of the circumstances. *Brady v. United States,* 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); *King v. Dutton*, 17 F.3d 151 (6th Cir. 1994); *Riggins v. McMackin*, 935 F.2d 790, 795 (6th Cir. 1991); *Berry v. Mintzes,* 726 F.2d 1142, 1146 (6th Cir. 1984). The determination of whether this plea was intelligently made depends upon the particular facts and circumstances of this case. *Johnson v. Zerbst,* 304 U.S. 458, 463 (1938); *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993).

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).

Brady v. United States, 397 U.S. 742, 755 (1970), *quoting Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957).[1] The voluntariness of a guilty plea is determined in light of all relevant circumstances surrounding the plea. *Brady*, 397 U.S. at 749. If a prosecutor's promise is illusory, then a plea is involuntary and unknowing. *United States v. Randolph*, 230 F.3d 243,

[1] *Shelton* was later reversed by the *en banc* Fifth Circuit, 246 F.2d 571 (5th Cir. 1957), but in a memorandum opinion, the Supreme Court reversed that decision and remanded the case to the district court for further proceedings, 356 US. 26 (1958).

250–51 (6th Cir. 2000). Where a defendant is "fully aware of the likely consequences" of a plea, however, it is not unfair to expect him to live with those consequences. *Mabry v. Johnson*, 467 U.S. 504, 511 (1984). A plea-proceeding transcript which suggests that a guilty or no contest plea was made voluntarily and knowingly creates a "heavy burden" for a petitioner seeking to overturn his plea. *Garcia v. Johnson*, 991 F.2d 324, 326–28 (6th Cir. 1993). Where the transcript shows that the guilty or no contest plea was voluntary and intelligent, a presumption of correctness attaches to the state court findings of fact and to the judgment itself. *Id.* at 326–27.

A court cannot rely on the petitioner's alleged "subjective impression" "rather than the bargain actually outlined in the record," for to do so would render the plea colloquy process meaningless. *Ramos v. Rogers*, 170 F.3d 560, 566 (6*th* Cir. 1999). If the plea colloquy process were viewed in this light, any defendant who alleged that he believed the plea bargain was different from that outlined in the record would have the option of withdrawing his plea despite his own statements during the plea colloquy indicating the opposite. *Id.*

By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime. *United States v. Broce*, 488 U.S. 563, 570 (1989); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

As part of the State Court Record, Respondent has filed a transcript of the plea hearing (Transcript, ECF No. 13-2). The hearing began with a statement by the prosecutor of the facts of the crime. He recited that Larry Littlepage, the victim, was shot three times (once in the abdomen and twice in the head) at his home on Pippin Road in Colerain Township on July 18, 2013. *Id.* at PageID 1081. The body was found the next day. On July 20, 2013, Petitioner sent text messages to multiple members of his family confessing that he had planned the murder and then carried it out. *Id.* at PageID 1082. Police found Petitioner at Mount Airy Hospital in the

chapel, having overdosed on sleeping pills. *Id.* Next to him the police found a digital recorder with a lengthy confession to the murder. *Id.* at PageID 1082-83. After he was restored to consciousness by hospital personnel, he was Mirandized and he again confessed. *Id.* This process was repeated after his release from the hospital. *Id.* at PageID 1083. Mr. Littlepage stated his motive for killing his brother arose from a family dispute following his father's death in 2010. *Id.*

Judge Nadel then asked Littlepage if he was pleading guilty of his own free will and he responded that he was. *Id.* at PageID 1084. Putting the matter the other way around, Judge Nadel asked him if anyone had "made any threats, promises, or anything like that to get you to plea[d]" and he responded "no, sir." *Id.*

Judge Nadel then advised Littlepage of the possible sentences, life without parole or life with parole eligibility after twenty, twenty-five, or thirty years. (Transcript, ECF No. 13-2, PageID 1085.) He then mentioned that there could be a fine of up to $25,000 and that there would be a mandatory consecutive sentence of three years on the gun specification. *Id.* at PageID 1084. Judge Nadel also discussed the written plea form and confirmed that Littlepage had signed it of his own free will. *Id.* at PageID 1087. He obtained an acknowledgement from Littlepage that "by pleading guilty, you make a complete admission of your guilt." *Id.* Judge Nadel explained the rights being waived by the plea and Littlepage's understanding that he was giving up those rights by pleading guilty. *Id.* at PageID 1088. Mr. Littlepage affirmed that he was not under the influence of drugs or alcohol. *Id.* The Judge then accepted the guilty plea. *Id.*

On appeal Littlepage raised a single assignment of error, to wit, that his plea was not made knowingly, intelligently, and voluntarily because Judge Nadel did not comply with Ohio R. Crim. P. 11(C)(2)(A) by advising him that he was not eligible for community control (*State v.*

Littlepage, No. C-140574 (1st Dist. Aug. 26, 2015), SCR, Ex. 35, PageID 550). He made additional arguments about not making a separate plea to the firearm specification and not being told he would not be permitted to ingest drugs of abuse in prison and would be subject to random drug testing while incarcerated. The First District found that none of these recitals was necessary under Ohio Crim. R. 11 and affirmed the conviction.

As the law cited above makes clear, the question of whether a plea was knowing, intelligent, and voluntary is a question of federal constitutional law. That is to say, a person who is convicted and sentenced on a guilty plea that is not knowing, intelligent, and voluntary has been deprived of due process of law as guaranteed by the Fourteenth Amendment. Ohio R. Crim. P. 11 is designed to protect that due process right by ensuring that guilty pleas are constitutional.

When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 100 (2011); *Brown v. Payton,* 544 U.S. 133, 140 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams (Terry) v. Taylor,* 529 U.S. 362, 379 (2000). Deference is also not required if the state court decision "is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2).

The question of whether a plea was knowing, intelligent, and voluntary is a question of fact on which a state court finding is entitled to deference in the absence of clear and convincing evidence to the contrary. Certainly on the face of the Plea Transcript there is no evidence that the plea was invalid. Littlepage heard the facts as recited by the prosecutor and made no claim

they were in error. He heard the nature of the charge and the possible sentences and the rights he would be giving up by pleading guilty. Nothing that was before the trial court or the First District on direct appeal rebuts a finding that the plea was constitutionally valid.

Ohio allows a person who contends his conviction was unconstitutionally obtained to file a petition for post-conviction relief under Ohio Revised Code § 2953.21 and Littlepage did so. In his Petition, his first claim was that he received ineffective assistance of trial counsel from his trial attorney, Daniel F. Burke, Jr., because Burke "coerced him into pleading guilty . . . failed to investigate my claims, perfect evidence, or gather *Brady* materials." (ECF No. 13, PageID 271.) As evidence he referred to his own attached Affidavit, "photos gathered after trial, drug information showing my diminished capacity, and e-mails from deceaced's [sic] son." *Id.* In his claim number two, he asserted Judge Nagel was biased against him; that the judge's conduct prevented him from presenting his defense of innocence; that his diminished capacity was evident from his attempted suicide at the Justice Center;and that his plea was coerced by his attorney, the prosecutor, and the "judge's bias and prejudice." In claim number three he alleged prosecutorial misconduct by (1) coercing the plea of guilty while knowing of his diminished capacity, (2) refusing to investigate his claims of innocence, and (3) refusal to turn over *Brady* materials including gunshot residue test results.

The Petition is supported by a seventy-three paragraph affidavit of Daniel Littlepage (executed on July 28, 2014) in which he claims he was present when his brother Gary shot the victim, but he was just listening and did not actually see the shooting. He admits that he went to the victim's house on July 18, 2013, the day of the killing, to confront the victim over being sued by the victim and other siblings for part of his father's estate; his father had died in 2010. He admits that after the shooting he went home, had a confrontation with his wife, and attempted

suicide by consuming seventy 30mg tablets of Temazepam. Littlepage asked for the appointment of an investigator and a "reconstructionist" who he said would find physical evidence to confirm his version of the events. Other attachments are a set of photographs of the house where the murder occurred, the purported contents of emails from the deceased's son which are not facially exculpatory, and lengthy public domain materials describing possible side effects of Temazepam.

In his Reply Memorandum in support of his Petition, he refers to conversations his attorneys had with his daughter and provides an affidavit from his wife recounting a conversation in which Daniel Burke, one of his trial attorneys, said he was not going to take the pictures of Larry Littlepage's house that Petitioner had requested (ECF No. 13, PageID 380). She avers that she herself took the pictures, the ones attached to the Petition. A parallel affidavit from Monica Littlepage, Petitioner's daughter, was also filed. *Id.* at PageID 381. There is also an attached letter from a Doctor Dirk Hines who treated Petitioner with antidepressants and the Temazepam. *Id.* at PageID 383. He makes no comments about any likelihood of medication effects at the time of Littlepage's plea.

On appeal from Judge Nadel's denial of the post-conviction petition, the First District held as follows:

> Neither the record of the proceedings leading to Littlepage's conviction upon his plea nor the outside evidence offered in support of his postconviction claims demonstrate that his plea was the unknowing, involuntary, or unintelligent product of his trial counsel's ineffectiveness, the trial judge's predisposition against him, prosecutorial misconduct, or any medication that he was taking.
>
> Thus, Littlepage, by his guilty plea, waived those challenges to his conviction that were unrelated to the entry of his plea. And with respect to his challenges to the knowing, voluntary, and intelligent nature of his plea, he failed to sustain his burden of submitting

> evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief. We, therefore, hold that the common pleas court properly denied Littlepage's postconviction petition without an evidentiary hearing. See R.C. 2953.21(C) and (E); *State v. Pankey*, 68 Ohio St.2d 58, 428 N.E.2d 413 (1981); *State v. Jackson,* 64 Ohio St.2d 107, 413 N.E.2d 819 (1980). Accordingly, we overrule the assignments of error and affirm the court's judgment.

State v. Littlepage, No. C-140760 (1st Dist. Dec. 4, 2015)(unreported; copy at ECF No. 13-1, PageID 881).

This decision is not based on an unreasonable determination of the facts based on the evidence presented. Littlepage made no protest of innocence at the time of his plea or at the time of sentencing. The photographs he wanted Burke to take do not demonstrate anything about his innocence; the captions he has added to them are of course unsworn hearsay. It does not constitute ineffective assistance of trial counsel to fail to gather evidence which, while it might have supported Littlepage's eventual narrative about what happened, in themselves prove nothing. Nothing in his post-conviction filings shows he would have been under the influence of Temezapam when he made his plea and of course he swore to Judge Nadel that he was not under the influence of any drug. More importantly, his affidavit is, as Judge Nadel found, very self-serving. He admits being present when the victim was shot and being armed at the time. He admits a motive to confront the victim over what happened with his father's estate. He offers no motive for Gary Littlepage to have shot the victim when apparently Gary and Larry were among the siblings against whom Daniel had a grudge. He offers no proof of any coercion by his trial attorney, the prosecutor, or Judge Nadel. Nor does he offer any explanation of his pre-custody recorded confession or of his emails to family members admitting the murder. Because Littlepage's post-conviction petition does not present evidence sufficient to overcome his solemn

admission of guilt at the plea colloquy, the Magistrate Judge finds that the conclusion of the Ohio courts that the plea was knowing, intelligent, and voluntary is not an unreasonable determination of the facts on the basis of the evidence presented.

The First Ground for Relief is therefore without merit.

Ground Two: Ineffective Assistance of Appellate Counsel

In his Second Ground for Relief, Littlepage claims he received ineffective assistance of appellate counsel.

The governing standard for ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. In other words, to establish ineffective assistance, a defendant must show both deficient performance and prejudice. *Berghuis v. Thompkins,* 560 U.S. 370, 389 (2010), *citing Knowles v. Mirzayance,* 556 U.S.111 (2009).

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires

> that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainwright*, 477 U.S. 168 (1986); *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). *See generally* Annotation, 26 ALR Fed 218.

A criminal defendant is entitled to effective assistance of counsel on appeal as well as at trial, counsel who acts as an advocate rather than merely as a friend of the court. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Penson v. Ohio*, 488 U.S. 75 (1988); *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008). Counsel must be appointed on appeal of right for indigent criminal defendants. *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California,* 386 U.S. 738 (1967); *United States v. Cronic,* 466 U.S. 648 (1984). The right to counsel is limited to the first appeal as of right. *Ross v. Moffitt*, 417 U.S. 600 (1974). The *Strickland* test applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Burger v. Kemp,* 483 U.S. 776 (1987). To evaluate a claim of ineffective assistance of appellate counsel, then, the court must assess the strength of the claim that counsel failed to raise. *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011), *citing Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008). Counsel's failure to raise an issue on appeal

amounts to ineffective assistance only if a reasonable probability exists that inclusion of the issue would have changed the result of the appeal. *Id., citing Wilson.* If a reasonable probability exists that the defendant would have prevailed had the claim been raised on appeal, the court still must consider whether the claim's merit was so compelling that the failure to raise it amounted to ineffective assistance of appellate counsel. *Id., citing Wilson.* The attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983)("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." 463 U.S. 751-52). Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003); *Williams v. Bagley,* 380 F.3d 932, 971 (6th Cir. 2004), *cert. denied,* 544 U.S. 1003 (2005); *see Smith v. Murray*, 477 U.S. 527 (1986).

As with all other claims presented in federal habeas, a claim of ineffective assistance of appellate counsel must first be presented to the state courts. Littlepage did so in the way required by Ohio law, by submitting an Application to Reopen his direct appeal under Ohio R. App. P. 26(B). The First District considered that Application on the merits and denied it. *State v. Littlepage*, No. C-140574 (1st Dist. Jan 26, 2016)(unreported; copy at SCR, ECF No. 13, PageID 648-50.) Noting that Littlepage had pleaded guilty to aggravated murder, the First District further recorded that appellate counsel had raised only one assignment of error, "contending that Littlepage's guilty plea was not knowing, voluntary, or intelligent." *Id.* at PageID 649. The First District decided the ineffective assistance of appellate counsel claim as follows:

> In his application to reopen this appeal, Littlepage contends that his appellate counsel was ineffective in presenting in his brief "only a far reaching speculative technical issue, without Assignments of Error such as: (A) Miranda Violations; (B) Weight

> and Sufficiency of Evidence; (C) Diminished Capacity; (D) Actual Innocence; (E) Interview Suppression; and (F) Ineffective Assistance of Trial Counsel."
>
> By his knowing, voluntary, and intelligent guilty plea, Littlepage waived his proposed actual-innocence, diminished-capacity, and weight-and-sufficiency claims. *See* Crim.R. 11(B)(1) (providing that a guilty plea is a complete admission of guilt); *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), paragraph one of the syllabus (holding that "a counseled plea of guilty is an admission of factual guilt which removes issues of factual guilt from the case"). He also waived his proposed Fourth Amendment challenges. *See State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (holding that a knowing, voluntary, and intelligent guilty plea waives any "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea"). And he waived all challenges to his trial counsel's ineffectiveness unrelated to the knowing, involuntary, or intelligent nature of his guilty plea. *See id.* Accordingly, appellate counsel cannot be said to have been ineffective in failing to assign these matters as error on appeal.
>
> Nor was appellate counsel ineffective in failing to assign as error trial counsel's ineffectiveness in counseling Littlepage's guilty plea. The proposed challenge depends for its resolution upon evidence outside the trial record. Therefore the appropriate vehicle for advancing it is a postconviction petition. *See State v. Perry,* 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967), paragraph nine of the syllabus.

Id. at PageID 649-50.

Littlepage argues he was prejudiced by appellate counsel's performance because he was not able to argue his additional assignments of error (Petition, ECF No. 9, PageID 197). The First District actually decided the ineffective assistance of appellate counsel claim on the first *Strickland* prong, holding there was no deficient performance in failing to raise assignments of error whose consideration was blocked by the res judicata rule in *State v. Perry*.

Here, as with the First Ground for Relief, this Court must defer to the state court

conclusion unless it is an objectively unreasonable application of clearly established Supreme Court precedent. *Terry Williams v. Taylor*, 529 U.S. 362, 409-13 (2000). The Magistrate Judge concludes the decision was not objectively unreasonable. It applied the correct federal constitutional standard under *Strickland*. It found that the omitted assignments of error could not have been heard because of the guilty plea and the *State v. Perry* bar. This was a correct application of *Tollett v. Henderson, supra*. The Sixth Circuit has repeatedly held that the res judicata rule of *State v. Perry* is an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001).

Accordingly, the Second Ground for Relief is without merit.

Ground Three: Cumulative Error/Inadequate State Review

In his Third Ground for Relief, Mr. Littlepage seems to be claiming that all of the errors in his trial and appellate court proceedings, taken together, entitle him to habeas corpus relief.[2]

After enactment of the Antiterrorism and Effective Death Penalty Act in 1996, a claim of cumulative error is not cognizable in habeas corpus. *Sheppard v. Bagley*, 657 F.3d 338, 348 (6th Cir. 2011), *cert. denied*, 132 S.Ct. 2751 (2011), *citing Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005), *cert. denied sub nom. Moore v. Simpson*, 549 U.S. 1027 (2006).

> Moreland argues that the cumulative effect of counsel's errors should be considered in determining whether he has demonstrated

[2] Littlepage makes a reference in the text of his Ground Three to a state action for habeas corpus. He has never filed such an action, so far as the record discloses.

> a reasonable probability of a more favorable outcome. However, "post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief." *Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010) (quoting *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)).

Moreland v. Bradshaw, 699 F.3d 908, 931 (6th Cir. 2012), *cert. denied sub nom. Moreland v. Robinson*, 134 S.Ct. 110 (2013).

Similarly, a claim that a state court review process is inadequate is also not cognizable in habeas corpus. *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986)(claims of denial of due process and equal protection in collateral proceedings not cognizable in federal habeas because not constitutionally mandated).

Littlepage's Claim of Actual Innocence

Throughout his pleadings in this case and previously in the state court proceedings, starting at least with his petition for post-conviction relief, Littlepage has claimed that he is actually innocent of the murder of his brother Larry because the murder was actually committed by his brother Gary.

As the Warden points out, a free-standing claim of actual innocence will not support habeas corpus relief. *Herrera v. Collins*, 506 U.S. 390, 408-11 (1993).

> Case law in the Sixth Circuit establishes that the Supreme Court of the United States has never recognized a free-standing or substantive actual innocence claim. *Cress v. Palmer*, 484 F.3d 844, 854 (6th Cir. 2007), *citing Zuern v. Tate*, 336 F.3d 478, 482, n.1 (6th Cir. 2003), and *Staley v. Jones*, 239 F.3d 769, 780, n.12 (6th Cir. 2001). The Supreme Court has twice suggested that a "truly persuasive demonstration" of actual innocence would render a

> petitioner's execution unconstitutional. *Herrera v Collins,* 506 U.S. 390, 417 (1993); *House v. Bell*, 547 U.S. 518 (2006).

Raymond v. Sheets, 2012 U.S. Dist. LEXIS 160374, *26-27 (S.D. Ohio Nov. 8, 2012); *Stojetz v. Ishee*, 2014 U.S. Dist. LEXIS 137501 *185-86 (S.D. Ohio Sept. 24, 2014)(Frost, D.J.).

The federal courts will recognize evidence of actual innocence as excusing procedural default of some other constitutional claim or as extending the statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). However, Littlepage does not present an actual innocence claim of this sort. Instead, he claims that because he is actually innocent, he must be released or at least given a trial.

As the First District has explained but Petitioner seems not to understand, a plea of guilty which is knowing, intelligent, and voluntary waives any right to a trial, to the presumption of innocence, to present evidence, etc. Mr. Littlepage was not denied an opportunity to have a trial or present evidence. Instead, he waived those rights by pleading guilty. While he claims he has never wavered in his claim of innocence, that is not accurate. He appeared in open court and solemnly admitted that he was guilty. Before that happened, he had made the digital recording of a confession before he took the overdose. After he recovered from the overdose, he confessed twice more. At the sentencing hearing, he twice apologized for what he had done. When Judge Nadel asked him why he killed his brother, he said it was "[j]ust a lot of stuff going on." (Transcript, SCR, ECF No. 13-3, PageID 1095). Later in the colloquy Littlepage said he was sorry it ever happened. *Id.* at 1097. At no point in the proceeding did he claim he was innocent.

Conclusion

Based on the foregoing analysis, it is respectfully recommended that the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

December 20, 2017.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. .Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Daniel Littlepage,

Petitioner,

v.

Case No. 1:16cv1005

Judge Michael R. Barrett

Warden,
Chillicothe Correctional Institution,

Respondent.

ORDER

This matter is before the Court on the Magistrate Judge's December 20, 2017 Report and Recommendation ("R&R") (Doc. 24) and February 9, 2018 Order Denying Motion for Stay and Abeyance; Supplemental R&R (Doc. 29). Petitioner has filed objections to the Magistrate Judge's R&Rs. (Docs. 27, 31).

I. BACKGROUND

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. § 2254. In the underlying state court proceedings, Petitioner was indicted for one count of murder and one count of aggravated murder, both with firearm specifications, arising out of the death of his brother Larry Littlepage. Petitioner plead guilty to aggravated murder and one firearm specification. Petitioner was sentenced to life imprisonment with parole eligibility at twenty years, plus three consecutive years for the firearm specification.

Petitioner claims three grounds for relief: (1) his guilty plea was invalid; (2) ineffective assistance of appellate counsel; and (3) cumulative error. Petitioner also claims that he is actually innocent of the murder of his brother Larry because the murder was committed by his other brother, Gary.

In the December 20, 2017 R&R, the Magistrate Judge recommends denying the petition with prejudice. In the February 9, 2018 Order, the Magistrate Judge denied Petitioner's Motion for Stay and Abeyance.[1] In the Supplemental R&R, the Magistrate Judge again recommends that the Petition be dismissed with prejudice. The Magistrate Judge also recommends that Petitioner be denied a certificate of appealability, and that this Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed in forma pauperis.

II. ANALYSIS

A. Standard of review

When timely objections to a magistrate judge's order are received on a dispositive matter, the assigned district judge "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). After review, the district judge "may accept, reject, or modify the recommended decision; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*; *see also* 28 U.S.C. § 636(b)(1). General objections are insufficient to preserve any issues for review: "[a] general objection to the entirety of the Magistrate [Judge]'s report has the same effect as would a failure to object." *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Nevertheless, the objections of a petitioner appearing *pro se* will be construed liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

[1]This Motion was never filed as a separate docket entry and only appears in the record as an attachment to the Petition.

B. Guilty Plea

Petitioner makes a number of arguments related to his guilty plea. The Magistrate Judge explained that on appeal in the state court proceedings, Petitioner had already claimed that his plea was not made knowingly, intelligently, and voluntarily. As part of the appeal of his post-conviction petition, the First District Court of Appeals concluded that there was no support for Petitioner's claim that his guilty plea was the unknowing, involuntary, or unintelligent product of his trial counsel's ineffectiveness, the trial judge's predisposition against him, prosecutorial misconduct, or any medication that he was taking. The Magistrate Judge found that this conclusion was not based on an unreasonable determination of the facts based on the evidence presented.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254 only permits habeas relief if the state court judgment "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In his Objections, Petitioner argues that there is evidence that he overdosed on medications on two occasions which demonstrates that his guilty plea was not made knowingly, intelligently, and voluntarily.

The Magistrate Judge addressed the first overdose, which occurred on July 20, 2013. Petitioner was found unconscious in the chapel of Mt. Airy Hospital. Next to Petitioner was a digital recorder which contained a lengthy confession to his brother's murder. The Magistrate Judge noted that Petitioner did not plead guilty until five months later in December of 2013. As to the second overdose, it appears that Petitioner is referring to an overdose on the morning of his arraignment. (Doc. 31-1, PAGEID # 1354). However, that arraignment took place on July 22, 2013. (Id.) Therefore, the same rationale applies to the second overdose as applies to the first overdose. As the Magistrate Judge explained, Petitioner's conviction was not based upon the confessions which took place before or after his overdose, but was based upon his statements on the record during his plea colloquy on December 10, 2013. As the Magistrate Judge pointed out, Petitioner specifically stated that he was not under the influence of drugs and alcohol when he entered his plea. (Doc #: 13-2, PAGEID # 1088).[2] Therefore, Petitioner's own statements in the transcript show that he knowingly and voluntarily chose to plead guilty. A plea-proceeding transcript which suggests that a plea was made voluntarily and knowingly creates a "heavy burden" for a petitioner seeking to overturn his plea. *Garcia v. Johnson*, 991 F.2d 324, 326–28 (6th Cir. 1993). Petitioner has not met that burden here. Accordingly, even if Petitioner could have shown that his confessions were made while he was under the influence of drugs, and were therefore constitutionally inadmissible, Petitioner nevertheless cannot prevail on his habeas claim since the record established that his guilty plea was in fact voluntary. *Accord Reed v.*

[2]The Magistrate Judge stated that Petitioner's statements were sworn. (Doc. 29, PAGEID# 1293). However, there is nothing in the record showing that Petitioner was sworn in during the plea hearing.

Henderson, 385 F.2d 995, 997 (6th Cir. 1967).

Similarly, while Petitioner argues that his guilty plea was coerced by his attorneys with the threat of the death penalty, a solemn plea of guilty presents a "formidable barrier" to a subsequent claim to the contrary. *Blackledge v. Allison*, 431 U.S. 63, 73, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Petitioner explains that he never received discovery or *Brady* material from the prosecutors, so he had to trust the advice of his attorneys.[3] However, the Sixth Circuit has held that "a prosecutor's failure to disclose arguably exculpatory *Brady* material prior to plea bargaining did not render the defendant's guilty plea involuntary where a factual basis for the plea was established at the plea proceeding." *Robertson v. Lucas*, 753 F.3d 606, 621 (6th Cir. 2014) (citing *Campbell v. Marshall*, 769 F.2d 314, 318, 323-24 (6th Cir.1985)).

Next, Petitioner claims that his plea was invalid because Ohio Rule of Criminal Procedure 11 requires that during the plea colloquy he plead guilty separately to aggravated murder and the firearm specification. However, as the Magistrate Judge explained, the First District found that a separate plea to the gun specification was not necessary under Rule 11. (See Doc. 13, PAGEID# 552).[4] Citing *State v. White*, 2002

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[3]Petitioner also accuses Judge Nadel—who presided over his criminal proceedings—of judicial bias and committing fraud upon the court by withholding or encouraging the withholding of this discovery or *Brady* material from him. Petitioner has not provided anything more than this unsupported allegation to support his claim of bias. While Petitioner does argue that Judge Nadel's denial of his Motion for Delayed Appeal demonstrates bias, the Magistrate Judge explained that Petitioner was ultimately granted his delayed appeal by an appropriate judge.

[4]Petitioner also argued in his objections that his guilty plea was not valid because the plea was not accepted by a three-judge panel. As the Magistrate Judge explained in his Supplemental R&R, Petitioner's argument relies on *State v. Parker*, 95 Ohio St. 3d 524, 525, 769 N.E.2d 846, 848 (Ohio 2002), in which the Ohio Supreme Court held a "defendant charged with a crime punishable by death who has waived his right to trial by jury must . . . have his case heard

WL 31169182 (Ohio Ct. App. 2002), the First District explained that Ohio Criminal Rule 11(C)(3) only requires a defendant to enter a separate plea to a death-penalty specification. (Id.) This Court must respect this determination unless there was a violation of due process. *Riggins v. McMackin*, 935 F.2d 790, 795 (6th Cir. 1991). Therefore, the sole inquiry is whether Petitioner's guilty plea comported with the protections of due process. *Id.*

At the plea hearing, the judge reviewed the Entry Withdrawing Plea of Not Guilty and Entering Plea of Guilty, which was signed by Petitioner. (Doc. 13-2, PAGEID# 1087). The judge also had the following exchange with Petitioner:

> THE COURT: And you understand that by pleading guilty, you make a complete admission of your guilt. Do you understand that? The only thing left to do will be to sentence you, which could be as I just indicated. You understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And by pleading guilty, you waive the following rights. By pleading guilty, you waive the following rights: Again, you waive your right to a jury trial. You waive your right to confront witnesses against you. You waive your right to have subpoenaed witnesses to testify in your favor. And you waive your right to require the state to prove your guilt beyond a reasonable doubt at a trial in which you cannot be compelled to testify against yourself.
>
> Do you understand the rights you waive, or give up, by pleading guilty?
>
> THE DEFENDANT: Yes, sir.

(Doc. 13-2, PAGEID# 1087-88). Finally, the judge reviewed the potential penalties for

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and decided by a three-judge panel even if the state agrees that it will not seek the death penalty." As the Magistrate Judge also explained, a three-judge panel is not required where the defendant is not charged with a death penalty specification. *See State v. Butler*, 2018 WL 4232369, *3 (Ohio Ct. App. 2018). Here, Petitioner was charged with firearm specifications, not a death penalty specification.

both the aggravated murder and the gun specification. (Doc. 13-2, PAGEID# 1086). This Court concludes that the plea colloquy supports the state court's determination that Petitioner's plea was knowing and voluntary. Therefore, the Court finds no error in the Magistrate Judge's conclusion that Petitioner's First Ground for Relief is without merit. Accordingly, Petitioner's Objections on this point are OVERRULED.

C. Ineffective assistance of appellate counsel

Claims of ineffective assistance of appellate counsel are subject to the two-prong *Strickland* test. *Evans v. Hudson*, 575 F.3d 560, 564 (6th Cir. 2009). First, Petitioner must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, Petitioner must show that such performance prejudiced his defense. *Id.* Counsel's failure to raise an issue on appeal could only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004) (citing *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001).

The Magistrate Judge noted that in deciding Petitioner's ineffective assistance of appellate counsel claim, the First District found that by his knowing, voluntary and intelligent guilty plea, Petitioner waived his proposed actual-innocence, diminished-capacity, and weight-and-sufficiency claims, which he maintains his appellate counsel should have raised on appeal. As a result, the First District concluded that his appellate counsel cannot be said to have been ineffective in failing to raise the

claims on appeal. The Magistrate Judge determined that this conclusion was not an objectively unreasonable application of clearly established Supreme Court precedent. The Court finds no error in the Magistrate Judge's conclusion that Petitioner's Second Ground for Relief is without merit.

D. Cumulative error

As the Magistrate Judge explained, under the Antiterrorism and Effective Death Penalty Act, a claim of cumulative error is not cognizable in habeas corpus. *See Williams v. Anderson,* 460 F.3d 789, 816 (6th Cir. 2006) ("[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue."); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) ("[W]e have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief."). Therefore, the Court finds no error in the Magistrate Judge's conclusion that Third Ground for Relief is without merit. Accordingly, Petitioner's Objections on this point are OVERRULED.

E. Actual innocence

In his Objections, Petitioner claims that the Magistrate Judge attempts to preclude a letter from Linda Freeman dated July 22, 2013 which shows that he is actually innocent. However, as the Magistrate Judge explained, the letter is unsworn and was not made a part of the state court record.[5] The Magistrate Judge concluded that this Court is precluded from considering the letter by *Cullen v. Pinholster*, 563 U.S. 170, 182, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

[5]While the Magistrate Judge stated that this letter was already in existence months before Petitioner waived his right to present evidence and plead guilty on December 10, 2013, it appears that the letter was not sent to Petitioner until June 23, 2015. (Doc. 31-1, PAGEID# 1361).

In *Pinholster*, the Supreme Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S.Ct. at 1398. Thus, "evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 1400.

As this Court has recognized, district courts which have addressed the issue have unanimously held that *Pinholster's* limitation on new evidence does not apply to claims of actual innocence when it is used to excuse a procedural default of another claim. *Johnson v. Warden, Chillicothe Corr. Inst.*, No. 2:16-CV-985, 2018 WL 9669761, at *5 (S.D. Ohio June 26, 2018), *objections overruled*, No. 2:16-CV-985, 2018 WL 9662539 (S.D. Ohio Sept. 20, 2018) (citing *Vinson v. Mackie*, Case No. 14-cv-14542, 2016 WL 6595021, at *1 (E.D. Mich. Nov. 8, 2016) (collecting cases)). However, as the Magistrate Judge explained, in this case, Petitioner has not presented this type of "gateway" innocence claim. Instead, Petitioner brings a freestanding innocence claim.

As the Sixth Circuit has noted, the Supreme Court has yet to determine whether a federal habeas court may entertain a freestanding innocence claim. *Stojetz v. Ishee*, 892 F.3d 175, 208 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1262 (2019) (citing *House v. Bell*, 547 U.S. 518, 554-55 (2006)). However, the Sixth Circuit explained that if such a claim were cognizable, "the showing required for such a hypothetical claim would be greater than that required for a gateway-innocence claim." *Id.* (citing *House*, 547 U.S. at 555). Accordingly, if a petitioner cannot "meet the standard for a gateway-innocence

claim—viz., establishing that 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt[,]'"—he cannot meet the higher burden which would apply to a free-standing claim. *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)).

Here, Petitioner cannot meet the lower standard for a gateway-innocence claim based on the letter from Linda Freeman dated July 22, 2013. In the letter, Freeman states that she and her husband were parked outside Larry Littlepage's house on the night of his murder. (Doc. 31-1, PAGEID# 1363). Freeman writes that she heard arguing and three "pops" which sounded like gun shots. (Id.) Freeman states that she and her husband observed a woman and man come in and out of the house several times; and then leave and return to the house in a silver car. (Id.) Freeman also states that she observed the man and woman load things into the silver car and throw things into the woods next to the house. (Id.) Freeman explained that she did not come forward with this information sooner because her husband was concerned they would be retaliated against. (Id.) However, there is nothing in the letter which would constitute "substantial evidence pointing to a different suspect." *House*, 547 U.S. at 554. Freeman merely saw other people at Larry Littlepage's house on the day he died. This evidence does not exclude the possibility that Petitioner was also at the house at some point. The Court concludes that the evidence does not demonstrate that "it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt."

Therefore, the Court finds no error in the Magistrate Judge's conclusion that even

if such a claim were permissible, Petitioner has not established a claim of actual innocence. Accordingly, Petitioner's Objections on this point are OVERRULED.

F. Stay and Abeyance

The Magistrate Judge noted that there was never a ruling on Petitioner's Motion for Stay and Abeyance, which was filed as an attachment to his Petition (Doc. 1-3). The Magistrate Judge explained that Petitioner's request for stay and abeyance would need to be premised on a finding by this Court that any claim was truly unexhausted.[6] However, the Magistrate Judge found that Petitioner has not brought a claim which cannot be decided due to lack of exhaustion.

In his Objections, Petitioner argues that there is no basis to deny his Motion for Stay and Abeyance. Petitioner maintains that there are documents which were a part of the state court record which should have been made a part of the record in this case, so therefore there are claims which have not been exhausted. This issue regarding the completeness of the record was addressed by the Magistrate Judge. (See Doc. 20, PAGEID# 1189). However, the issue here is the application of the exhaustion doctrine. "Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). "In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *Id.* As the Magistrate Judge explained, there is no dispute

[6]Under *Rhines v. Weber*, 544 U.S. 269 (2005), a petition should be stayed and held in abeyance only where (1) the petitioner's unexhausted claims are not plainly meritless, and (2) there was good cause for failing to present the claims to the state court before petitioning for habeas corpus relief in this Court.

that Petitioner's claims have been exhausted; and therefore, a stay of his Petition is unnecessary. Therefore, the Court finds no error in the Magistrate Judge's denial of Petitioner's Motion for Stay and Abeyance as moot.

G. Certificate of appealability

Petitioner argues that a certificate of appealability should issue because in reviewing his *in forma pauperis* motion, the Magistrate Judge determined the Petition was not too frivolous to order an answer.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court's assessment of the claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 2d 931 (2003).

As the Magistrate Judge explains, the question of whether a petition is sufficient to warrant an answer and the question whether, after the case has been decided, an appeal should be permitted to proceed *in forma pauperis* are different questions. The Court finds no error in the Magistrate Judge's conclusion that Petitioner should be denied a certificate of appealability.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's objections are **OVERRULED** and the Magistrate Judge's December 20, 2017 R&R (Doc. 24) and Supplemental R&R (Doc. 29) are **ADOPTED**;

2. The Petition **is DISMISSED with PREJUDICE**;

3. Petitioner's Objections to the February 9, 2018 Order Denying Motion for Stay and Abeyance (Doc. 31) are **OVERRULED**;

4. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability; and

5. With respect to any application by Petitioner to proceed on appeal *in forma pauperis*, the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal of this Order would not be taken in "good faith," and, therefore, Petitioner is **DENIED** leave to appeal in forma pauperis upon a showing of financial necessity. *See* Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997).

IT IS SO ORDERED.

/s/ Michael R. Barrett
Michael R. Barrett
United States District Judge

Exhibit "F"

ENTERED
JUN 10 2014

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State of Ohio : CASE NO. B1304393

-vs- : ORDER

Daniel Littlepage

It is hereby ordered that the Motion for Leave to File Delayed Appeal filed by defendant, pro-se, on June 2, 2014, is hereby denied.

Norbert A. Nadel

Norbert A. Nadel, Judge

Clerk to send copies to defendant.

6/10/2014
Date

D106622420

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 01/13/2014
code: GJEI
judge: 109

Judge: NORBERT A NADEL

NO: B 1304393

STATE OF OHIO
VS.
DANIEL LITTLEPAGE

JUDGMENT ENTRY: SENTENCE: INCARCERATION

CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

- - -

STATE OF OHIO,
Plaintiff,
vs.
DANIEL LITTLEPAGE,
Defendant.

APPEAL NO: C-1400574
CASE NO: B-1304393
VOLUME 1 OF 2

- - -

COMPLETE TRANSCRIPT OF PROCEEDINGS

PLEA

- - -

APPEARANCES:

DAVID L. PREM, JR., ESQ.,
JOSHUA A. BERKOWITZ, ESQ.,
on behalf of the State;

DANIEL F. BURKE, JR., ESQ.,
FRANK E. OSBORNE, ESQ.,
on behalf of the Defendant.

BE IT REMEMBERED that upon the hearing of this cause, on December 10th, 2013, before the Honorable Norbert A. Nadel, a judge of the said court, the following proceedings were had:

THE COURT: Good morning.

Today is the 10th.

Mr. Littlepage, you've signed this form indicating you're going to plead guilty here to Count 2, which is a charge of aggravated murder, but also a three-year gun specification.

You've received a copy of the indictment against you. And before I ask any more questions, I'm going to ask the prosecutor to read the substance of the charge briefly and the underlying facts.

MR. BERKOWITZ: Thank you, Judge.

This occurred on or about July 18th of 2013, in Hamilton County, Ohio.

The Defendant purposely caused the death of his brother, Larry Littlepage. He did so with prior calculation and design. This occurred at the victim's home on Pippin Road in Colerain Township. The murder was caused by gunshot wounds. Three gunshot wounds; one to the abdomen, and twice to

the victim's head at close range. Again, that was at the victim's residence.

The murder was discovered a day later on the afternoon of July 19th when the victim's coworkers went to his house trying to determine why he missed work on that day. They found his body in his garage suffering from the wounds caused by those three gunshots.

On the following day, on July 20th, text messages from the Defendant to other family members confessed his involvement in the murder; the fact that he had planned it and, in fact, had committed the murder.

Those relatives contacted Colerain Township Police, who initiated a search for the Defendant. He was located at the Mercy Mt. Airy Hospital in the chapel, having overdosed on sleeping medication in an apparent suicide attempt. With the Defendant, aside from a loaded firearm, was a digital recorder in which he had

recorded a lengthy confession to the crime. He was, obviously, able to be saved by medical personnel at the hospital.

Upon regaining consciousness, detectives with Colerain Township advised the Defendant of his rights and interviewed him at the hospital where he again admitted to shooting his brother, planning his death over a period of time, and causing his death.

Upon his release from the hospital, he was again interviewed by police, again advised of his rights, and again he confessed to planning and murdering his brother.

The Defendant claimed that his motive in killing his brother and planning his death was over a dispute between family members following the death of their father in 2010. He indicated that Larry Littlepage was not the only family member that he intended to kill, but he would be the first.

THE COURT: Okay. Thank you,

Mr. Berkowitz.

Mr. Littlejohn [sic], you're making this plea on your own free will; is that correct?

THE DEFENDANT: Yes.

THE COURT: No one has made any threats, promises, or anything like that, in order to get you to plea, have they?

THE DEFENDANT: No, sir.

THE COURT: I will advise you of the penalties now, and I can sentence you as follows: I can sentence you, number one, life imprisonment without parole; I can sentence you to life imprisonment with parole eligibility after serving 20 years of imprisonment; I can sentence you also to life imprisonment with parole eligibility after serving 24 years of imprisonment; or I can sentence you to life imprisonment with parole eligibility after serving 34 years of imprisonment.

And also, there is a monetary fine of up to $25,000.

In addition, there's a gun specification, which means I must sentence to you three years of actual incarceration to be served consecutive with and prior to the sentence on the aggravated murder.

Do you understand the possible penalties?

THE DEFENDANT: Yes, sir.

(Mr. Prem confers with the Court.)

THE COURT: The prosecutor has corrected me, so let me repeat the penalties again. I can sentence you as follows: Life imprisonment, life imprisonment without parole. I can sentence you to life imprisonment with parole eligibility after serving 20 full years of imprisonment. I can sentence you to life imprisonment with parole eligibility after serving 25 full years of imprisonment, or can I sentence you to life imprisonment with parole eligibility after serving 30 full years of imprisonment.

MR. PREM: Yes, sir.

THE COURT: And again, as I told you, there's a $25,000 -- a fine of up to $25,000.

In addition, I will tell you again, I just told you, there's a gun specification, which means I must sentence you to three years actual incarceration to be served consecutive with and prior to the sentence for aggravated murder.

Do you understand the possible penalties?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you?

THE DEFENDANT: 47.

THE COURT: 47. How far did you go in school?

THE DEFENDANT: All the way, through 12th grade.

THE COURT: Okay. So you can read; is that correct?

THE DEFENDANT: Yes.

THE COURT: Now, this form that says Entry Withdrawing Plea of Not

Guilty and Entering Plea of Guilty, this form basically explains the same rights I'm just explaining. I'm going to show this to you. It has your signature on it. I'm going to show this to you and ask if you've seen this before.

THE DEFENDANT: Okay.

THE COURT: You read it, you understood it, you signed it of your own free will. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that by pleading guilty, you make a complete admission of your guilt. Do you understand that? The only thing left to do will be to sentence you, which could be as I just indicated. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And by pleading guilty, you waive the following rights. By pleading guilty, you waive the following rights: Again, you waive your right to a jury trial. You waive your right to confront witnesses against you.

You waive your right to have subpoenaed witnesses to testify in your favor. And you waive your right to require the State to prove your guilt beyond a reasonable doubt at a trial in which you cannot be compelled to testify against yourself.

Do you understand the rights you waive, or give up, by pleading guilty?

THE DEFENDANT: Yes, sir.

THE COURT: You're not under the influence of drugs or alcohol now, are you?

THE DEFENDANT: No.

THE COURT: You're saying, "No." Okay. Good.

Okay, I accept your plea to aggravated murder. We'll order a presentence investigation report, victim impact statements, and we'll pick a date for sentencing.

Mr. Prem or Mr. Berkowitz, did I leave anything out?

MR. PREM: Judge, I do not believe you did. I think you hit

everything.

THE COURT: Any other questions?

MR. BURKE: Judge, thank you.

THE COURT: Okay. Let's pick a date. You indicated --

MR. PREM: There are family members, Judge, that are present, but we're told that there were other family members who wanted to be here. They weren't here today because we weren't 100 percent sure if it was actually going to be a plea. And what I would ask the Court to consider is maybe setting it on Monday, if that's convenient, because --

THE COURT: Monday of when? Some Monday. Is that what you're saying?

MR. PREM: Like the 6th or the 13th of January.

THE COURT: Let me look here. Of January. The 6th is not good here. You're saying Monday? Is that what you're saying?

MR. PREM: With the people that are traveling, Judge, we were just going

to ask you to consider that because they can spend the night with family members.

THE COURT: That's fine. How about January 13th at 9:15?

MR. PREM: That's perfect, Your Honor. Thank you.

THE COURT: Okay. 1/13/14, 9:15.

(Whereupon, the proceedings concluded.)

CERTIFICATE

I, COLLEEN R. O'CONNELL, the undersigned, a Registered Diplomate Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the same time and place stated herein, I recorded in stenotype and thereafter transcribed the within 11 pages and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 21st day of November, 2014.

Colleen R. O'Connell

Colleen R. O'Connell
Registered Diplomate Reporter
Court of Common Pleas
Hamilton County, Ohio

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

- - -

STATE OF OHIO, :

Plaintiff, :

vs. : Case No. B-1304393
C-1400574

DANIEL LITTLEPAGE, :

Defendant. : VOL. II of II

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:

DAVID PREM, ESQ.,
On behalf of the State,

DANIEL BURKE, ESQ,
FRANK OSBORNE, ESQ.,
On behalf of Defendant.

- - -

BE IT REMEMBERED that upon the hearing of this sentencing on Monday, January 13, 2014 before the Honorable Norbert A. Nadel, a said judge of the said Court of Common Pleas, the following proceedings were had.

- - -

MORNING SESSION, Monday, January 13, 2014

THE COURT: State of Ohio versus Daniel Littlepage.

MR. PREM: David Prem on behalf of the State.

MR. BURKE: Daniel Burke for the defendant.

MR. OSBORNE: Frank Osborne for the defendant.

THE COURT: All right. Folks, this is State of Ohio versus Daniel Littlejohn.

MR. BURKE: Littlepage.

THE COURT: Littlepage, excuse me. You're right. Daniel Littlepage. And on December the 10th the defendant pled guilty to Count 2 of aggravated murder with a Specification 2, a three-year gun specification.

We requested a presentence investigation report. We requested victim impact statements and we're here for sentencing.

I will ask you, do you want to say anything and we'll start off with you, counsel?

Either counsel want to say anything before I pass sentence?

MR. BURKE: Judge, just briefly. On Mr. Littlepage's behalf we do have the presentence report and the Court read the presentence investigation report.

THE COURT: Right.

MR. BURKE: I won't go through that. We find the presentence report to be in order and correct.

Just to remind the Court also, we twice had NGRI.

THE COURT: Right.

MR. BURKE: Even though it was not found under the guidelines of NGRI, I think the situation at the last doctor, the psychiatrist talked about was all the medications and all the items that he was on and the whole situation.

THE COURT: Right.

MR. BURKE: We still believe under this situation that he would not have done what he had done with some of the medications, but the doctor did not find that on our behalf so we will just submit

that.

THE COURT: Certainly.

Mr. Littlepage, do you want to tell me anything before I pass sentence?

THE DEFENDANT: I am very sorry for what I have done.

THE COURT: What?

THE DEFENDANT: I am very sorry for what I have done.

THE COURT: Why would you kill your brother?

THE DEFENDANT: Just a lot of stuff going on, sir.

THE COURT: What?

THE DEFENDANT: Just a lot of stuff going on.

THE COURT: Well, there was obviously a fight over family money and you had taken care of your dad.

THE DEFENDANT: Right.

THE COURT: They were accusing you of stealing the money and then they sued you. What happened to that lawsuit?

THE DEFENDANT: I had my attorney James Sullivan go ahead and take that

money, whatever they claimed it, off the value of the house.

THE COURT: And then you paid some money?

THE DEFENDANT: Yeah.

THE COURT: Okay. And then your father and even, of course, your siblings were very angry, weren't they?

THE DEFENDANT: Always have been.

THE COURT: And I can understand that. So this was this fight over money. How old are you roughly now?

THE DEFENDANT: 47.

THE COURT: You're 47. So really and then, of course, you were angry and went over there. You were watching your brother's habits and all that. How old was your brother?

THE DEFENDANT: 53.

THE COURT: 53. And that was your blood brother, wasn't it?

And it wasn't adoption or half brother, that's your brother. How many brothers or sisters do you have?

THE DEFENDANT: I have one

stepbrother, I have another blood brother and I have four sisters.

THE COURT: And I think one of the sisters lives in Oklahoma; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: And you had been -- yeah, yeah.

THE DEFENDANT: I wanted to and I stopped, Your Honor, to ask them why did they done that to me. Get in my mail, take my -- get me this trouble and after three years and my dad had been gone and somebody did give me an answer so I stopped it. I asked Larry because I saw him outside and --

THE COURT: Okay. Anything else you want to tell me before I pass sentence?

You obviously pled guilty here and you're obviously taking responsibility for that.

THE DEFENDANT: I am just sorry it ever happened.

THE COURT: Yeah. Well, you have taken responsibility. At least the other family members don't go -- don't have to go

(TR. 19, Line 9-)

through the business of a trial. At least today there will be some finality.

MR. PREM: Your Honor, there is a family member representative named Charlene who would like address the Court.

THE COURT: Stand over here or tell me what you want to tell me.

MR. PREM: These are -- victim's and defendant's sisters and the other ladies would be like to be there just to support them.

THE COURT: Move that up a little closer and hopefully I will be able to hear you. Just tell me. Don't read anything. Just tell me. That would be a lot better.

THE WITNESS: In 2010 my father told me if he pulled anything off to go after him and I promised him I would. And there was no lawsuit against him. He was charged by the State of Ohio for misuse of a power of attorney for his own financial gain.

Because he stole a 91-year-old man's money and turned around and stole my oldest brother's inheritance. So there was no lawsuit and Larry did

nothing to him. Absolutely nothing. And he stopped and he prayed.

He ambushed and he murdered my brother. And then he shoots him in the stomach to get his attention. I want to get his attention today by sentencing him to life without parole.

THE COURT: Okay.

THE WITNESS: Because what he did was totally uncalled for.

THE COURT: I agree with you.

THE WITNESS: A murderer. I tried to tell the authorities in 2010 and '11 he was a murderer. He murdered my father. Nobody did nothing about it.

I also tried to get a restraining order against him for Gary, Larry and myself and everybody said oh, he has got to do something first. Well, here we are today because he murdered Larry and I want justice.

THE COURT: We'll try to give you the best justice we can.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you, folks.

MR. PREM: Be careful, ladies.

THE COURT: Don't fall over anything. Anybody else want to say anything before I pass sentence?

MR. PREM: Judge, just on behalf of the State, I did speak to the entire family about the options that are available to the Court with respect to sentencing and I think I have explained to them what you have to take into consideration in fashioning your sentence.

I think the Court hit the nail right on the head. You didn't say it maybe this way, but this is not about medicine as Mr. Burke put it. It's really about greed. A guy stealing money.

THE COURT: It's about money.

MR. PREM: And he could make all the excuses he wants for why he did this, but it was a cold and calculated act. He did admit to it. He did cooperate with the police. He did plead guilty as charged, but he obviously is a dangerous person and we would ask you to take all that into

consideration.

THE COURT: Okay. Anything else that anybody wants to tell me before I pass sentence?

I do agree and we have done reports, we have done -- there has been two psychological reports at the request of the defense counsel. There has been presentence reports and there has been victim impact statements. We have heard from the defendant and basically this is all about money.

And actually just looking at this whole thing and hearing from everybody it sort of the reminds me of one of those horror movies involving a psychopathic killer in a horror movie. I don't understand how anybody could kill their brother. I really don't.

Here's a man with very little and almost no criminal record and it's not something that happened at the last minute or as a result of something. I mean this is something that went on for a while and built up in the defendant. He

stabbed -- obviously from the reports you stabbed him and you went over there with a gun and really like one of those horror movies. Almost like an Alfred Hitchcock horror movie involving a psychopathic killer. That is basically what we have here.

But we will take into consideration the fact that the defendant did admit his guilt, didn't put the family members here through a long drawn-out legal process which would have just made things worse than they are.

So the sentence of the Court will be on Count 2, the charge of aggravated murder, the sentence of the Court will be life imprisonment with parole eligibility after serving 20 years of imprisonment.

And on the specification, the Court sentences the defendant to three years of actual incarceration to be served consecutive with and prior to the sentence on Count 2.

So that means you have got to do at least 23 years and perhaps many, many

more. Because most of the time when you go before the parole board you will be in your 70s. You are 47 right now and you will be in your 70s, so it's possible you will spend the rest of your life in prison. Good luck to you.

Anything else that the State wants to add?

MR. BURKE: There will be no appeal. We'll not appeal this.

THE COURT: Okay.

MR. BURKE: We'll accept the sentences as given.

THE COURT: Okay. At least the family has some finality and some resolution to this horrible thing. Good luck to you.

MR. BURKE: For the record, I believe he has 175 days.

THE COURT: We will mark that 175 days credit time served.

(PROCEEDINGS CONCLUDED.)

CERTIFICATE

I, Harlow B. Blum, the undersigned, an Official Court Reporter for the Hamilton County Court of Common Pleas, do hereby certify that at the same time and place stated herein, I recorded in Stenotype and thereafter transcribed the within 13 - 25 pages, and that the foregoing Transcript of Proceedings is a true, complete, and accurate transcript of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set my hand this 5TH day of November, 2014.

_____

HARLOW B. BLUM, RPR, RMR
Official Court Reporter
Court of Common Pleas
Hamilton County, Ohio